Supreme Court, U.S.
FILED

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NO. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

ORVILLE RANDALL MEADE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner's plea of guilty entered knowingly and voluntarily due to the U.S. District Court's failure to comply with Rule 11 of the Federal Rules of Criminal Procedure?

2. Whether the United States District Court's failure to comply with the mandates of Rule 11 of the Federal Rules of Criminal Procedure constitutes harmless error?

LIST OF PARTIES

The Petitioner is Orville Randall Meade.

The Respondent is the United States of America, represented by Thomas Bondurant, Assistant United States Attorney for the Western District of Virginia in Roanoke, Virginia.

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OPINIONS IN COURTS BELOW

The United States District Court in Roanoke issued an Order on August 17, 1993, dismissing the Petitioners Motion to Vacate pursuant to 28 U.S.C. § 2255 (App.2-3). The United States District Court's opinion is reproduced at App. 4-13.

The Fourth Circuit Court of Appeals affirmed the United States District Court's dismissal of the Motion to Vacate on March 29, 1994 (App. 14-16) and denied the Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on May 18, 1994. (App. 17-18).

JURISDICTION

Jurisdiction in this Court is invoked under Rule 10 of the Rules of the United States Supreme Court.

This case was originally brought under 28 U.S.C. § 2255. The petition is timely filed.

RELEVANT RULES

Rule 11(c) of the Federal Rules of Criminal Procedure states:

> "The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense."

Rule 11(h) of the Federal Rules of Criminal Procedure states:

> "Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."

Rule 32(d) of the Federal Rules of Criminal Procedure States:

> "If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255."

STATEMENT OF THE CASE

Appellant was charged in a twelve count indictment involving possession of controlled substance and possession of firearms in the U.S. District Court for the Western District of Virginia in Roanoke. Two of the charges were violations of 18 U.S.C. § 924(c) which carry five (5) year mandatory minimum sentences which must run consecutively. A written plea agreement was not entered into, although two charges were dismissed at the government's request at the arraignment. Elimination of these counts did not reduce the Appellant's sentence of a hundred and seventy-one (171) months as he was held accountable for the charges according to § 1B1.3(a)(2) of the Federal

Sentencing Guidelines. (See page 17 of the pre-sentence report at App. 35).

On June 21, 1990, the Petitioner was arraigned with a co-defendant, Edward J. Meade, in U.S. District Court. Ms. Debbie Goolsby, a third year law student representing the U.S. Attorney's Office, explained the charges on which the Defendant was being arraigned to the court. The following discussion occurred between Ms. Goolsby and the Court:

MS. GOOLSBY: Okay. Count 5 charges that on or about January 18th, 1990, Orville R. Meade, during and in relation to a drug trafficking crime, did use ---

THE COURT: Used a firearm.

MS. GOOLSBY: The maximum sentence is a fine of two hundred fifty thousand dollars ($250,000.00) and/or mandatory imprisonment for five (5) years or both.

THE COURT: All right.

MS. GOOLSBY: The same maximum sentence. Count 10 charges that on or about January 19th, 1990, Orville R. Meade, during and in relation to a drug trafficking crime did use or carry a firearm. That maximum sentence is a two hundred fifty thousand dollar ($250,000.00) fine.

THE COURT: Is the same as five (5).

MS. GOOLSBY: Right.

(App. 19-22).

After this discussion, the Court began its Rule 11 colloquy with the Defendant and stated as follows:

THE COURT: All right, Now, Mr. Orville Meade, as to Count 3, the Court could --- gave you the maximum it could impose any sentence from zero (0) up to twenty (20) years, a fine of up to a million dollars ($1,000,000.00) plus a period of supervised release of three (3) years or more. Do you understand the maximum sentence for Count 3?

MR. ORVILLE MEADE: Yes, sir.

THE COURT: And Count 4 is the same as 3. Count 5 carries five (5) years mandatory period of incarceration and a fine of up to two hundred and fifty thousand dollars ($250,000.00). Do you understand that?

MR. ORVILLE MEADE: Yes, sir.

THE COURT: Count 6 has the same maximum sentence as Counts 3 and 4, 5 and 7. Count 8 carries the same maximum sentence and Count 9 the same. Count 10 has the same sentence as Count 5, Count 11, possession of firearms, the court could impose a period of confinement of up to ten (10) years, a fine of up to two hundred fifty thousand ($250,000.00) or a combination of both. And the same sentence for Count 12. Do you understand the maximum sentences for each of these offenses?

MR. ORVILLE MEADE: Yes, sir.

(App. 23-24).

The Petitioner filed a Motion to Vacate his sentence pursuant to 28 U.S.C. § 2255 alleging involuntariness of his guilty plea based on the Court's

Rule 11 colloquy and ineffective assistance of counsel. The Petitioner alleged that counsel was ineffective for 1) failing to explain to him the mandatory minimum of ten (10) years 2) advising him to plead guilty to charges to which he was not guilty and 3) not pursuing his cooperation with the Government.

Pursuant to the Government's Motion to Dismiss, the District Court dismissed the Motion without an evidentiary hearing ruling that it had complied with Rule 11 and that any ineffective assistance of counsel was cured by the Court's Rule 11 colloquy.

REASONS FOR GRANTING THE PETITION

I. The District Court failed to inform the Petitioner that he was facing a mandatory minimum sentence of ten years so that he did not knowingly and voluntarily enter a plea of guilty.

The Constitution via the due process clause, requires that a defendant's plea be voluntary and intelligent. Boykin v. Alabama, 395 U.S. 238, 242 (1969). Further, a plea can only be voluntary if it is "entered by one fully aware of the direct consequences" of that plea. Brady v. United States, 397 U.S. 742, 755 (1970). Rule 11 of the Federal Rule of Criminal Procedure was implemented to protect this due process right. The Supreme Court has emphasized the value

in a District Court adhering meticulously to Rule 11. See McCarthy v. United States, 394 U.S. 459, 465, 89 Supreme Court 1166, 1170, 22 L.Ed.2d 418 (1969).

While recognizing that the Rule 11 procedure itself is not constitutionally mandated, the Court in McCarthy described its purpose:

> It is designed to assist the District Judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntarily....and to produce a complete record at the time that the plea is entered of the factors relevant to this voluntariness determination. Id. at 465.

Rule 11(c) of the Federal Rule of Criminal Procedure reads, in part:

> "Before accepting a plea of guilty or nolo contendere,

> the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands the following: 1) the nature of the charge to which the plea is offered, 2) the mandatory minimum penalty provided by law, if any, and 3) the maximum possible penalty provided by law...."

It is axiomatic, therefore, that in order for a court to comply with this rule, that the information given to the defendant regarding the minimum and maximum penalties be correct.

In the present case, the Appellant was not correctly informed of the minimum mandatory penalties involved in his guilty plea. The Government representative at his arraignment, Ms. Goolsby, misstated the applicable penalty by stating that the penalty for

the 18 U.S.C. § 924 offense in Count 5 was "a fine of $250,000.00 and/or mandatory imprisonment for five (5) years or both." (App. 11). As to Count 10, the other 18 U.S.C. 924 count, the Government stated the penalty as the "maximum sentence is a $250,000.00 fine." (App. 12-13). At the time, the Court did not correct these assertions, even though both were in fact false.

When the court addressed the Appellant, although it stated that Count 5 carried a five (5) year period of incarceration and later stated that Count 10 was the same as Count 5, the court failed to do two things: he failed to mention that these were the minimum possible penalties; and he

failed to mention that each five (5) year sentence had to be served consecutive to each other and to any other sentence imposed. (App. 15-16).

The Appellant contends that he was not aware that he was in fact facing a ten (10) year mandatory minimum sentence by pleading guilty to Counts 5 and 10. The court below never told the Petitioner that the sentence he would receive would not be less than ten (10) years. The phrase "mandatory minimum of ten (10) years" was never stated during the arraignment.

Rule 11(c) also mandates that the U.S. District Court inform the defendant of the use of the Federal Sentencing Guidelines.

The U.S. District Court clearly informed the Appellant that his sentence would be controlled by Federal Sentencing Guidelines. The Court stated:

> "These offenses allegedly occurred, I believe on or after November 1, 1987 and they would therefore be subject to the sentencing guidelines. Under the Federal Sentencing Guidelines is a range of sentence based on the total adjusted offense level and your criminal history and if the Court goes outside these guidelines and imposes sentence, the party that feels aggrieved by the Courts action, has the right of appeal to the Court of Appeals for the Fourth Circuit. In other words, if I go under the guidelines, the Government has the right to appeal and if I can go over the guidelines, you have a right to appeal. Do you understand that these offenses are subject to the guidelines?" (App. 24-26).

A glaring omission exists. The Court does not state that it cannot sentence the Appellant below the mandatory minimum sentence of ten (10) years, nor more than one hundred ten (110) years. The Court does not mention that despite the existence of the applicability of the Federal Sentencing Guidelines, he cannot sentence the Petitioner to a lesser sentence than the ten (10) year statutory mandatory minimum.

To further compound the Appellant's unawareness of a mandatory minimum penalty of ten (10) years, the U.S. District Court failed to mention a minimum mandatory again, although it made reference to the maximum penalty several other times.

After reading the charges and penalties, the Court stated:

> "Alright. Gentleman, understanding all the things that we have been over with you, the nature of the offenses of which you are charged, the elements that make up these offenses, the rights that you have if you plead not guilty, the rights you give up if you plead guilty, the maximum sentence for these offenses, the fact that they are subject to the sentencing guidelines, the consequences of pleading guilty, when you consider all of these things, do you still want to plead guilty?"

Additionally, when the Court decided to accept the guilty pleas, the Court further stated:

> "The Court and the U.S. Attorney has explained to each of these individuals the maximum sentence for these offenses and that they are controlled by the Federal Sentencing Guidelines..." (App. 28).

Finally, after the Court accepted the guilty pleas and asked the clerk to read and have the Appellant execute the guilty plea form, the Clerk stated to the Appellant:

> "In the presence of my counsel who has fully explained the charges contained in the indictment against me and having received a copy of the indictment from the U.S. Attorney before being called upon to plead, I hereby plead guilty to said indictments Counts 3-12. I have been advised of the maximum punishment which may be imposed by the Court for this offense. My plea of guilty has been made voluntarily and without threat or promises of any kind." (App. 29-30).

Appellant, when signing the guilty plea form, acknowledged that he understood the maximum penalties, but not the mandatory minimum penalties.

This form in and of itself should refute the U.S. District Court's finding that the Appellant understood the mandatory minimum penalties to which he pleaded guilty. The Appellant was not aware of the direct consequences of his guilty plea; the appellant's guilty plea was involuntary according to Rule 11(c) of the Federal Rules of Criminal Procedure and should be vacated. Hammond v. United States, 528 F.2d 15 (4th Cir. 1975); Boykin v. Alabama, 395 U.S. 238 (1969); Brady v. United States, 397 U.S. 742 (1970).

The Petitioner would also point out that the District Court failed to inform that his plea to each Count subjected him to supervised release. The Court only mentioned supervised

release in regard to Count 3, again a clear violation of Rule 11(c). (App. 23-24).

When sentencing the Petitioner on April 22, 1991, the District Court stated "I think these sentences must run consecutively". (App. 33). In all due respect to the District Court, thinking that two (2) mandatory five (5) years sentences must run consecutively at the sentencing hearing, is tantamount to an admission that it was not aware of the direct consequences of the Petitioner's guilty plea at his arraignment. A Rule 11 violation is undisputed.

II. The U.S. District Court's failure to comply with Rule 11 is not "harmless error," the interpretation of which varies among the opinions of the Federal Courts of Appeal.

In order to determine whether a court should vacate a guilty plea after a Rule 11 violation, courts must determine whether the error was harmless. Courts have applied at least three different definitions of harmless error. A court must first consider at what stage the defendant is seeking to withdraw his guilty, either pre-sentence, on appeal or post-sentence.

The doctrine of harmless error has evolved over the past twenty years, although it was initially not recognized in the Supreme Court's

landmark case of U.S. v. McCarthy, 394 U.S. 459 (1969).

The Supreme Court in McCarthy ruled

> "that prejudice inheres in a failure to comply with Rule 11, for non-compliance deprives the Defendant of the Rule's procedure safeguards that are designed to facilitate a more accurate determination of the volunteering of his plea. Our holding is that a defendant whose plea has been accepted in violation of Rule 11, should be afforded the opportunity to plea a new..." Id. at 471-72.

McCarthy was frequently relied upon in cases where the Defendant sought relief of a Rule 11 violation by avenue of direct appeal. Several circuits, based on McCarthy, ordered the withdrawal of a guilty plea whenever the U.S. District Court failed

to comply with Rule 11. See Notes of Advisory Committee on Rules, 1983 Amendment, Rule 11(h).

It was uncertain as to how the McCarthy standard applied to collateral attacks upon pleas pursuant 28 U.S.C. § 2255. The Supreme Court clarified this issue in Timmreck v. United States, 577 F.2d 377, (6th Cir. 1978), when it ruled that McCarthy was not applicable to motions pursuant to 28 U.S.C. § 2255. Timmreck, however, did not enunciate the applicable standard to these collateral proceedings.

Conflicting views surrounding Mccarthy and the treatment of Rule 11 omissions continued until 1983, when Congress amended Rule 11. Rule 11 was

amended to include a definition of harmless error. Rule 11(h) reads:

> Any variance from the procedures required by this Rule, which do not affect the defendant's substantial rights shall be disregarded.

Rule 11(h) modified McCarthy so that a technical failure to comply with Rule 11 did not require vacation of a plea and opportunity for a new plea.

As a result, the Fifth Circuit modified the "automatic vacatur" standard in McCarthy to include harmless error analysis in certain situation. The Fifth Circuit defined Rule 11 of omissions by the trial court as either partial or full omission as to core or non-core concern. The three core concerns defined by the Fifth Circuit are whether the defendant

understands 1) the nature of the charge, 2) direct consequences of the charge, and 3) whether the plea was coerced. If District Court failed to address a core concern, it would remand to the District Court and would allow the Defendant to plea a new. In any other situation, i.e. where a core concern was partially addressed or a non-core concern was partially addressed, the harmless error standard was used. See Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

The Seventh and Tenth Circuits continued with the same analysis. See, e.g. United States v. Peden, 872 F.2d 1303 (7th Cir. 1989); United States v. Vance, 868 F.2d 1167 (10th Cir. 1989).

The Fifth Circuit continued to apply its core versus non-core test until the case of United States v. Johnson, 1 F.3rd 296 (5th Cir. 1993) when it stated:

> "We no longer recognize the existence of any category of error in the Rule 11 proceeding that will mandate automatic reversal. To the extent that any of our prior holdings are inconsistent with the rule we here espouse, they are overruled." Id. at 303.

Based on Johnson, it appears that the Fifth Circuit intends to apply this definition of harmless error to both appellate attacks and a collateral attacks on pleas. However, the review of each Rule 11 challenge would be conducted differently depending on

nature of the attack, direct or collateral. Id. at 298.

If the challenge is based on appeal, the Fifth Circuit will review the transcript of the plea, colloquy hearing, but also portions of the record such as written plea agreements, the transcript of the sentencing hearing, and the sentence actually imposed.

The Fifth Circuit stated that upon review of post-plea colloquy attacks, it would only consider such information contained therein as "is temporarily relevant to the voluntary and uncoerced nature of the Defendant's guilty plea, and to his knowledge and understanding of the nature of the charges and the consequences of his plea. Id. at 298.

The Fourth Circuit in United States v. Defusco, 949 F.2d 114 (4th Cir. 1991) agrees with the Fifth Circuit as to the review of each Rule 11 challenge to a guilty plea on direct appeal, however, does not mention the review of guilty pleas challenged by collateral attack.

Other Circuits restrict their harmless error review to the plea hearing transcript. See e.g. United States v. Hourihan, 936 F.2d 508 (11th Cir. 1991); United States v. Goldberg, 862 F.2d 101 (6th Cir. 1988); United States v. Daniels, 821 F.2d 76 (1st Cir. 1987).

In contrast to the Rule 11(h) definition of "harmless error," the First Circuit in United States v. Luiz

Del Valle, 8 F.3d 98, (1st Cir. 1993), stated that it would adhere to the standard of "miscarriage of the justice" when reviewing post sentence request for plea withdrawal on direct appeal. Id. at 103. A miscarriage of justice standard was espoused in Hill v. United States, 368 U.S. 424 (922), where this Court ruled this was the standard to be applied in 28 U.S.C. § 2255 attacks on guilty pleas. See Notes of Advisory Committee on Rules, 1983, Rule 11(h).

The United States Court of Appeals for the District of Columbia stated in United States v. Watley, 987 F.2d 841 (DC Cir. 1993), that post-sentence withdrawal of a guilty plea depends on a showing of manifest injustice. Id.

at 847. Former Rule 32(d) applied the manifest injustice standard to post-sentence motions to withdraw pleas based on Rule 11 violations. See Notes of Advisory Committee on Rules, 1983, Rule 32(d).

Presently, Rule 32(d) of the Federal Rules or Criminal Procedure provides another means to attack a plea Rule 32(d) states:

> "If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255."

Yet another standard has emerged to by which a court should determine whether to vacate a plea.

In sum, the definition of harmless error differs depending on the circuit and the timing of the request to withdraw, either pre-sentence, direct appeal, or post-sentence. The Notes of Advisory Committee on Rules, 1983, Rule 32(d) also suggest that the standard may differ according to rule or statute pursuant to which the Defendant is making his attack. A Defendant who proceeds too late come under the more generous fair and just reason standard applied to pre-sentence attacks, must seek relief under 28 U.S.C. § 2255, where the applicable standard is the miscarriage of justice standard announced in Hill.

The Petitioner respectfully suggest that due to this confusion,

this Petition should be granted in any effort to ensure the finality of pleas.

As stated by the Supreme Court in Timmreck;

> "...every inroad on the concept of finality undermines confidence in the integrity of our procedures, and, by increasing the volume of judicial work, inevifeibly delays and impairs the orderly administration of justice..." Id. at 787.

The Petitioner also respectfully asserts that regardless of the definition of standard to be applied to harmless error, the error committed by the District Court at his arraignment is not harmless. He did not knowingly and voluntarily enter a plea of guilt to charges which carried a mandatory minimum of ten years. As alleged in his original motion, his attorney did

not inform him of the mandatory minimum of ten years.

The Petitioner's total sentence was approximately fourteen (14) years. A mandatory minimum sentence of ten (10) years is two-thirds of the sentence which the Petitioner actually received. The Fifth Circuit in United States v. Nevers, 7 F.3d 59 (5th Cir. 1993), stated that

> "where the minimum mandatory sentence of which the defendant was not informed constitutes a substantial portion of the sentence ultimately determined to be applicable under the Guidelines, we think there is a significant possibility that awareness of such minimum would have affected defendant's decision to plead guilty. Id. at 58.

See also, United States v. Johnson, 1 F.3d 296, 303, Footnote 31 (1993).

The Petitioner would not have pled guilty to a mandatory minimum sentence of ten (10) years.

CONCLUSION

In its opinion the U.S. District Court stated that it, not the Government, had explained the mandatory minimum sentence to the Petitioner. The Court does not dispute the fact that the Government misread the applicable penalties, not does it claim to have corrected this misstatement at the moment it was made.

The spirit of Rule 11 as evidenced by this Court's opinion in McCarthy, is that a defendant clearly understand the charges and the penalties to which a defendant is pleading guilty. Congress

intended that Courts adhere strictly to Rule 11, and have amended this Rule repeatedly to ensure a voluntary guilty plea.

The Court on one occasion stated the phrase "mandatory minimum of five (5) years." The Court never stated the phrase "mandatory minimum of ten years."

To expect this Petitioner to understand from his arraignment that he will serve at least ten (10) years is to completely reject the spirit of Rule 11.

He did not enter an intelligent and voluntary plea of guilty. He received no benefit by entering this plea. The original indictment contained twelve (12) counts. He pled

guilty to ten (10) counts. The dismissal of the two (2) counts was worthless; he gained nothing.

The Petitioner's substantial rights were affected. Pleading a man guilty to a sentence of at least ten (10) years without his knowledge, without a benefit for him whatsoever, without forcing the Government to prove its case is a "manifest injustice" and a "miscarriage of justice."

The Petitioner asks this Court to grant his Petition for Writ of Certiorari. He was denied his constitutional right to enter a knowing and voluntary guilty plea and asks this Court to vacate such plea.

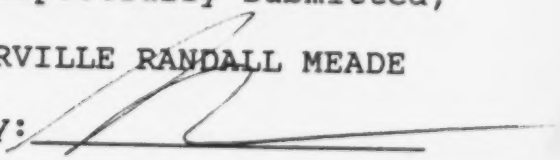
The Petitioner has also demonstrated that a uniform body of law

surrounding attacks upon pleas is lacking. The Petitioner is aware that this Court wishes to preserve the finality of judgments, and clarifying the standard and methods to be used by the courts would aid in ensuring the finality of judgments sought by the Court.

WHEREFORE, the Petitioner prays that this Court grant his Petition for Writ of Certiorari, and ultimately vacate his sentence.

Respectfully submitted,

ORVILLE RANDALL MEADE

By: 

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

ORVILLE RANDALL MEADE,	) Civil Action
	) No.: 92-
Petitioner,	)0910-R
v.	)
	) ORDER
UNITED STATE OF AMERICA,	)
	) By: Hon.
Respondent.	) James C.
	) Turk, U.S.
	) District Judge

In accordance with the written memorandum opinion entered this day, it is hereby

ADJUDGED AND ORDERED

that the petition under 28 U.S.C. §2255 is dismissed and that this action is struck from the active docket of this court.

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to the petitioner and to counsel of record for the respondents.

ENTER: This 17th day of August, 1993.

James C. Turk
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

ORVILLE RANDALL MEADE, Petitioner,	) Civil Action No.: 92-0910-R
v.	) MEMORANDUM OPINION
UNITED STATE OF AMERICA, Respondent.	) By: Hon. James C. Turk U.S. District Judge

Orville Randall Meade, a federal inmate represented by counsel, brings this motion to vacate, set aside, or reduce sentence under 28 U.S.C. § 2255. Petitioner pleaded guilty on June 21, 1990 to multiple counts of possession with intent to distribute cocaine, crack and LSD, as well as four counts

of possession or use of firearms.[1] Petitioner was sentenced to a total of 171 months.

Petitioner asserts that his guilty plea was involuntary and that counsel

---

[1] Petitioner was found guilty of:

four counts of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) (counts 3, 4, 6 and 7);

one count of possession of cocaine base (crack) in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) (count 8);

one count of possession with intent to distribute LSD in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) (count 9);

two counts of using or carrying a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c) (counts 5 and 10);

one count of possession of thirteen firearms while being a drug user in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2) (count 11);

and one count of possession of an unregistered firearm in violation of 26 U.S.C. §§ 5861(d), 5845(a)(4), and 5871 (count 12).

was ineffective for failing to advise him correctly concerning the mandatory minimum sentence as to counts 5 and 10 (using or carrying a firearm in relation to a drug trafficking crime). He further asserts that counsel was ineffective for allowing petitioner to plead guilty to counts 9 and 10 (distribution of LSD and possession of a firearm in relation to a drug trafficking crime on January 19, 1990), when the evidence failed to establish petitioner's guilt. Finally, petitioner asserts that counsel was ineffective for failure to pursue the opportunity for petitioner to obtain immunity in exchange for his testimony.

The court will first address the two charges of use of a firearm in

relation to a drug trafficking crime. The court is of the opinion that petitioner's plea was voluntary and that he was not prejudiced by the alleged ineffective assistance of counsel.

Petitioner essentially asserts that at his arraignment, the charges were read incorrectly and that the court failed to clarify the discrepancy. Petitioner was not aware that he was pleading guilty to two separate charges and that each carried a mandatory minimum of five years.

A guilty plea must be the informed and intelligent decision of the defendant. Boykin v. Alabama, 395 U.S. 238, 242 (1969). In spite of the petitioner's assertions, the transcript

makes it clear that the court, and not the government, explained each of the charges to the petitioner. The court went on to explain the penalties for each of these charges. The record clearly shows that the petitioner responded to the court's explanation and affirmed that he understood the charges and the penalties. His claims are therefore without merit.

Similarly, counsel was not ineffective for his failure to correctly explain the length of sentence. In order to show ineffective assistance, the petitioner must satisfy a two-prong test: he must show that counsel's representation fell below an objectively reasonable performance, and that there is a reasonable probability

that but for counsel's errors, petitioner would not have pleaded guilty. Hill v. Lockhart, 474 U.S. 52 (1985); Strickland v. Washington, 466 U.S. 668 (1984).

In this case, even if petitioner is correct and counsel misinformed the plaintiff as to the total length of his sentence, the petitioner has not shown that he was prejudiced by counsel's failure to explain the sentences correctly. The record shows that petitioner himself acknowledged that he understood the charges and the penalties as explained to him by the court; he cannot now assert that he was prejudiced by any prior information his attorney may have imparted.

Further, the court finds that counsel was not ineffective for allowing the petitioner to plead guilty to the charges of distribution of LSD and possession of a weapon in relation to a drug trafficking crime. Again, the court finds that the elements of the crime were explained to the petitioner and that he understood them, as evidenced by his responses to the court at arraignment. Further, petitioner responded affirmatively when the court asked the petitioner whether he had possessed LSD and knew what it was. Despite counsel's failure to advise petitioner that he should not plead guilty, petitioner was given the chance to assert that he had not in fact known that he possessed LSD at the

moment the court asked him whether he had committed the offense. Similarly, the court asked the petitioner whether he was guilty of possession of a firearm on the date in question, to which the petitioner responded that he had indeed possessed the firearm. Petitioner's claims are therefore without merit.

Finally, petitioner asserts that counsel failed to pursue cooperation with the government. Respondent has filed an affidavit asserting that petitioner was interviewed by law enforcement officials, who deemed the petitioner's information unreliable. The petitioner has not controverted respondent's assertion that no offer of immunity was granted the petitioner.

The court fails to see how petitioner's attorney could in any way have changed the outcome of the officers' investigation, nor has petitioner stated any particular reasons why counsel hindered the petitioner's chances of obtaining a grant of immunity.

In conclusion, the court is of the opinion that respondent's motion to dismiss the petition must be granted. An appropriate order shall be entered this day.

The petitioner is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within 30 days of the date of entry of this

Order, or within such extended period as the court may grant pursuant to Rule 4(a)(5).

ENTER: This 17th day of August, 1993.

James C. Turk
U.S. District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-6982

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ORVILLE RANDALL MEADE,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, District Judge. (CR-90-25, CA-92-910-R)

Submitted: March 17, 1994
Decided: March 29, 1994

Before PHILLIPS and LUTTIG, Circuit Judges, and BUTZNER, Senior Circuit Judge

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Affirmed by unpublished per curiam opinion.

Michael Morchower, MORCHOWER, LUXTON & WHALEY, Richmond, Virginia, for Appellant. Thomas Jack Bondurant, Jr., Assistant United States Attorney, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Appellant appeals from the district court's order denying his 28 U.S.C. § 2255 (1988) motion. Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly,

we affirm on the reasoning of the district court. United States v. Meade, Nos. CR-90-25, CA-92-910-R (W.D. Va. Aug. 19, 1993). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 18, 1994

No. 93-6982
CR-90-25
CA-92-910-R

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ORVILLE RANDALL MEADE

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERD that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

MS. GOOLSBY: THAT'S CORRECT.

THE COURT: AND HOW ABOUT FIVE (5)?

MS. GOOLSBY: FIVE (5) IS A DIFFERENT CHARGE --

MS. GOOLSBY: OKAY. COUNT 5 CHARGES THAT ON OR ABOUT JANUARY 18TH, 1990, ORVILLE R. MEADE, DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME, DID USE ---

THE COURT: USED A FIREARM.

MS. GOOLSBY: THE MAXIMUM SENTENCE IS A FINE OF TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00) AND/OR MANDATORY IMPRISONMENT FOR FIVE (5) YEARS OR BOTH.

THE COURT: ALL RIGHT.

MS. GOOLSBY: COUNT 6 IS THE SAME AS COUNTS 3 AND 4 WITH A DIFFERENT OFFENSE DATE.

THE COURT: RIGHT.

MS. GOOLSBY: ON OR ABOUT JANUARY 19TH THAT ORVILLE R. MEADE INTENTIONALLY AND UNLAWFULLY DISTRIBUTED LESS THAN FIVE HUNDRED (500) GRAMS OF COCAINE.

THE COURT: RIGHT.

MS. GOOLSBY: COUNT 7 WOULD BE THE SAME.

THE COURT: THE SAME.

MS. GOOLSBY: AND COUNT 8 CHARGES THAT ON OR ABOUT JANUARY 19TH, ORVILLE R. MEADE POSSESSED A MIXTURE OR SUBSTANCE CONTAINING COCAINE BASE, ALSO KNOWN AS CRACK. THE MAXIMUM SENTENCE IS THE SAME AS COUNTS 6 AND 7, 3 AND 4.

THE COURT: ALL RIGHT.

MS. GOOLSBY: COUNT 9, THE GRAND JURY CHARGES THAT ON OR ABOUT JANUARY

19TH 1990, ORVILLE R. MEADE POSSESSED WITH INTENT TO DISTRIBUTE LSD.

THE COURT: LSD.

MS. GOOLSBY: THE SAME MAXIMUM SENTENCE. COUNT 10 CHARGES THAT ON OR ABOUT JANUARY 19TH, 1990, ORVILLE R. MEADE, DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME DID USE OR CARRY A FIREARM. THAT MAXIMUM SENTENCE IS A TWO HUNDRED FIFTY THOUSAND DOLLAR ($250,000.00) FINE.

THE COURT: IS THE SAME AS FIVE (5).

MS. GOOLSBY: RIGHT. COUNT 11 CHARGES THAT ON OR ABOUT JANUARY 19TH, 1990, ORVILLE R. MEADE, BEING AN UNLAWFUL USER OR ADDICTED TO ANY CONTROLLED SUBSTANCE, KNOWINGLY

POSSESSED IN COMMERCE OR AFFECTING COMMERCE APPROXIMATELY THIRTEEN (13) FIREARMS. THE MAXIMUM SENTENCE FOR THIS COUNT IS A FINE OF TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00) AND/OR IMPRISONMENT FOR TEN (10) YEARS OR BOTH. COUNT 12 CHARGES THAT ON OR ABOUT JANUARY 19TH, 1990, ORVILLE R. MEADE WILLFULLY AND KNOWINGLY POSSESSED A FIREARM WHICH HAD NOT BEEN REGISTERED TO HIM IN THE NATIONAL FIREARMS REGISTRATION AND TRANSFER RECORD AND IT WAS A WEAPON MADE FROM A RIFLE WITH AN OVERALL LENGTH OF LESS THAN TWENTY-SIX (26) INCHES. THE MAXIMUM SENTENCE FOR THAT IS THE SAME AS COUNT 11.

MR. EDWARD MEADE: YES, SIR.

THE COURT: ALL RIGHT, NOW, MR. ORVILLE MEADE, AS TO COUNT 3, THE COURT COULD --- GAVE YOU THE MAXIMUM IT COULD IMPOSE ANY SENTENCE FROM ZERO (0) UP TO TWENTY (20) YEARS, A FINE OF UP TO A MILLION DOLLARS ($1,000,000.00) PLUS A PERIOD OF SUPERVISED RELEASE OF THREE (3) YEARS OR MORE. DO YOU UNDERSTAND THE MAXIMUM SENTENCE FOR COUNT 3?

MR. ORVILLE MEADE: YES, SIR.

THE COURT: AND COUNT 4 IS THE SAME AS 3. COUNT 5 CARRIES FIVE (5) YEARS MANDATORY PERIOD OF INCARCERATION AND A FINE OF UP TO TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($250,000.00). DO YOU UNDERSTAND THAT?

MR. ORVILLE MEADE: YES, SIR.

THE COURT: COUNT 6 HAS THE SAME MAXIMUM SENTENCE AS COUNTS 3 AND 4, 6 AND 7. COUNT 8 CARRIES THE SAME MAXIMUM SENTENCE AND COUNT 9 THE SAME. COUNT 10 HAS THE SAME SENTENCE AS COUNT 5. COUNT 11, POSSESSION OF FIREARMS, THE COURT COULD IMPOSE A PERIOD OF CONFINEMENT OF UP TO TEN (10) YEARS, A FINE OF UP TO TWO HUNDRED FIFTY THOUSAND (250,000) OR A COMBINATION OF BOTH. AND THE SAME SENTENCE FOR COUNT 12. DO YOU UNDERSTAND THE MAXIMUM SENTENCES FOR EACH OF THESE OFFENSES?

MR. ORVILLE MEADE: YES, SIR.

THE COURT: ALL RIGHT. AND THERE IS A SPECIAL MANDATORY ASSESSMENT OF

FIFTY DOLLARS ($50.00) FOR EACH OFFENSE. THESE OFFENSES ALLEGEDLY OCCURRED I BELIEVE ON OR AFTER NOVEMBER THE 1ST, 1987 AND THEY WOULD THEREFORE BE SUBJECT TO THE SENTENCING GUIDELINES. UNDER THE FEDERAL SENTENCING GUIDELINES THERE IS A RANGE OF SENTENCE BASED ON THE TOTAL ADJUSTED OFFENSE LEVEL AND YOUR CRIMINAL HISTORY AND IF THE COURT GOES OUTSIDE OF THE GUIDELINES AND IMPOSES SENTENCE, THE PARTY THAT FEELS AGGRIEVED BY THE COURT'S ACTION HAS THE RIGHT OF APPEAL TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT. IN OTHER WORDS, IF I GO UNDER THE GUIDELINES, THE GOVERNMENT HAS THE RIGHT TO APPEAL

AND IF I GO OVER THE GUIDELINES, YOU HAVE A RIGHT TO APPEAL. DO YOU UNDERSTAND THAT THESE OFFENSES ARE SUBJECT TO THE SENTENCING GUIDELINES?

MR. EDWARD MEADE: YES, SIR.

MR. ORVILLE MEADE: YES, SIR.

THE COURT: DO YOU ALSO UNDERSTAND THAT I TOLD YOU IF YOU PLED NOT GUILTY YOU COULD REMAIN SILENT ABOUT THE MATTER? YOU GIVE UP THAT RIGHT ON A PLEA OF GUILTY. IT PROBABLY WON'T BE DONE IN YOUR CASE, BUT ON A PLEA OF GUILTY EITHER THE U.S. ATTORNEY OR THE COURT HAS THE AUTHORITY TO CALL YOU AS A WITNESS, HAVE YOU SWORN BY THE CLERK AND THEN QUESTION YOU UNDER OATH CONCERNING THE COMMISSION OF

THESE OFFENSES. IF YOU WERE TO KNOWINGLY AND WILLFULLY TESTIFY FALSELY UNDER OATH, YOU COULD BE SUBJECT TO THE -- BEING CHARGED WITH THE CRIME OF PERJURY WHICH IS A FELONY AND IF CONVICTED ON THOSE CHARGES THEN THE PENALTIES OF PERJURY.

THESE INDIVIDUAL THEIR RIGHTS ON A NOT GUILTY PLEA, THEIR RIGHTS THAT THEY GIVE UP IF THEY PLEAD GUILTY. I FIND AS A MATTER OF FACT THEY UNDERSTAND THESE. THE COURT AND THE U.S. ATTORNEY HAS EXPLAINED TO EACH OF THESE INDIVIDUALS THE MAXIMUM SENTENCE FOR THESE OFFENSES AND THE FACT THAT THEY ARE CONTROLLED BY THE FEDERAL SENTENCING GUIDELINES. I FIND AS A MATTER OF FACT THEY UNDERSTAND THESE. THE COURT HAS EXPLAINED TO THESE GENTLEMEN THE CONSEQUENCES OF ENTERING PLEAS OF GUILTY. I FIND AS A MATTER OF FACT THEY UNDERSTAND THESE. AND FROM QUESTIONING THESE GENTLEMEN AND WHAT THEY TELL ME, I BELIEVE THERE TO BE A FACTUAL BASIS FOR THEIR PLEAS OF GUILTY.

GENTLEMEN, I'M GOING TO ACCEPT YOUR PLEAS OF GUILTY. I'M GOING TO ASK THE CLERK TO PLEASE READ TO EACH OF YOU AND HAVE YOU EXECUTE THE GUILTY PLEA.

THE CLERK: MR. EDWARD MEADE WILL GO FIRST. IN THE PRESENCE OF MY COUNSEL WHO HAS FULLY EXPLAINED THE CHARGES CONTAINED IN THE INDICTMENT AGAINST ME AND HAVING RECEIVED A COPY OF THE INDICTMENT FROM THE UNITED STATES ATTORNEY BEFORE BEING CALLED UPON TO PLEAD, I HEREBY PLEAD GUILTY TO SAID INDICTMENT, COUNT 2 THEREOF. I HAVE BEEN ADVISED OF THE MAXIMUM PUNISHMENT WHICH MAY BE IMPOSED BY THE COURT FOR THIS OFFENSE. MY PLEA OF GUILTY IS MADE VOLUNTARILY

AND WITHOUT THREAT OR PROMISES OF ANY KIND.

IF YOU WOULD SIGN THERE.

IN THE PRESENT OF MY COUNSEL WHO HAS FULLY EXPLAINED THE CHARGES CONTAINED IN THE INDICTMENT AGAINST ME AND HAVING RECEIVING A COPY OF THE INDICTMENT FROM THE UNITED STATES ATTORNEY BEFORE BEING CALLED UPON TO PLEAD, I HEREBY PLEAD GUILTY TO SAID INDICTMENT, COUNTS 3 THROUGH 12. I HAVE BEEN ADVISED OF THE MAXIMUM PUNISHMENT WHICH MAY BE IMPOSED BY THE COURT FOR THIS OFFENSE. MY PLEA OF GUILTY IS MADE VOLUNTARILY AND WITHOUT THREAT OR PROMISES OF ANY KIND.

IF YOU WOULD SIGN RIGHT HERE.

I HAND YOU ALL A COPY OF RESOLUTIONS ADOPTED SEPTEMBER 30TH, 1970 BY JUDICIAL COUNCIL OF THE FOURTH CIRCUIT. THE PLEAS HAVE BEEN EXECUTED.

THE COURT: ALL RIGHT. GENTLEMEN, YOU CAN HAVE A SEAT BACK OVER AT THE COUNSEL TABLE WITH YOUR ATTORNEYS. Is THE GOVERNMENT PREPARED TO PROCEED WITH ITS CASE?

MS. GOOLSBY: YES, YOUR HONOR.

THE COURT: WOULD YOU CALL YOUR FIRST WITNESS, PLEASE?

MS. GOOLSBY: CALL SPECIAL AGENT TOM GALLAGHER.

...OF SENTENCING: 3, 4, 6, 7, 8, 9, 11 AND 12. AS TO ALL OF THOSE COUNTS CONSOLIDATED, IT'S THE JUDGMENT OF THIS COURT THAT YOU BE COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS FOR A PERIOD OF INCARCERATION FOR A PERIOD OF INCARCERATION OF FIFTY-ONE (51) MONTHS.

AS TO COUNT 5, IT'S THE JUDGMENT OF THIS COURT THAT YOU BE COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS FOR A PERIOD OF INCARCERATION OF SIXTY (60) MONTHS.

AS TO COUNT 10, IT'S THE JUDGMENT OF THIS COURT THAT YOU BE COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS FOR A PERIOD OF

INCARCERATION OF SIXTY (60) MONTHS.

AND UNDER THE STATUTE, I THINK THE THREE (3) SENTENCES THAT THE COURT HAS IMPOSED MUST RUN CONSECUTIVE AND NOT CONCURRENT, TO BE FOLLOWED BY A PERIOD OF SUPERVISED RELEASE OF FOUR (4) YEARS.

LET ME SEE THE PROBATION OFFICER JUST A MINUTE.

AS TO THE COUNTS THAT I HAVE CONSOLIDATED FOR SENTENCE, TOO, IT'S THE FURTHER JUDGMENT OF THE COURT THAT YOU BE REQUIRED TO PAY A FINE OF TEN THOUSAND DOLLARS ($10,000.00). I'M GOING TO GIVE HIM SIX (6) MONTHS TO PAY THAT AND THE FINE TO BEAR NO INTEREST UNTIL THE SIX (6) MONTHS IS UP. SO IF

HE CAN GET IT PAID WITHIN SIX (6) MONTHS, NO INTEREST.

AS TO THE FOUR (4) YEARS OF SUPERVISED RELEASE, I'M GOING TO MAKE AS CONDITIONS OF THAT THAT HE NOT COMMIT ANY...

PART G. IMPACT OF PLEA AGREEMENT

71. had not Counts One and Two been dismissed, this defendant would have been exposed to a maximum $10,000,000 fine rather $6,000,000 and perhaps an additional 5 year minimum mandatory sentence, although this mandatory sentence would not have been required to run consecutive to any other sentence. As a practical matter, I doubt the dismissal of counts one and two would have any substantial effect on the final disposition of this case.

Respectfully Submitted,

G. WRAY WARE, CHIEF
UNITED STATES PROBATION OFFICER

By_____
JIMMIE F. DANIEL
UNITED STATES PROBATION OFFICER
WESTERN DISTRICT OF VIRGINIA

REVIEWED AND APPROVED:

_____

JOHN P. PICKFORD, SUPERVISING
UNITED STATES PROBATION OFFICER

JFD/lbb